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No. 268

Supreme Court of the United States

October Term, 1959

WALTER C. LOHMAN, JR.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Statutes Involved	3
Statement of Facts and the Material Involved	6
A. Proceedings below	6
B. The record facts	9
1. The Informer Witnesses	9
2. Refusal to Permit Laying of Foundation to Impeach	10
3. Limitation of Production of Documents	11
4. Government's Exhibit L	11
5. Materiality and Essential Elements Required to Be Proven by Government	12
Reasons for Granting the Writ	15
Conclusion	24
Appendix—	
Opinion of U. S. Court of Appeals for the Sixth Circuit	1a
Judgment	5a
Order Denying Rehearing	5a

Page

CASES CITED

American Communications Ass'n. v. Douds, 339 U. S. 382 ..... 12, 15, 21, 22
Bridges v. Wixon, 326 U. S. 135 23
Burstyn v. Wilson, 343 U. S. 495 23
Chastleton Corp. v. Sinclair, 264 U. S. 543 22
Cohen v. U. S., 178 F. 2d 588 19
Cossack v. U. S., 63 F. 2d 511 15
Danaher v. U. S., 3[illegible] F. 2d 325 20
DeJonge v. Oregon, 299 U. S. 353 23
Freidus v. U. S., 223 U. S. 598 15
Gordon v. U. S., 344 U. S. 414 15
Harris v. U. S., 104 F. 2d 41 20
Hills v. U. S., 97 F. 2d 710 20
Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398 22
Jencks v. U. S., 353 U. S. 657 15
Jones v. Opelika, 316 U. S. 584 23
Lanzetta v. New Jersey, 306 U. S. 451 23
Nashville, C. & St. L. Ry. v. Walters, 294 U. S. 405 22
Rolland v. U. S., 200 F. 2d 678 ..... 15, 19, 20
Saia v. New York, 334 U. S. 558 23
Sanchez v. U. S., 134 F. 2d 271, cert. denied 319 U. S. 768 19
Schneider v. State, 308 U. S. 147 23
Stromberg v. California, 283 U. S. 359 23
Terry v. U. S., 131 F. 2d 40 19
Thomas v. Collins, 323 U. S. 516 23
Thornhill v. Alabama, 310 U. S. 88 23
Todorow v. U. S., 178 F. 2d 439 ..... 19, 20
U. S. v. Barra, 149 F. 2d 489 19
U. S. v. Cardiff, 344 U. S. 174 23
U. S. v. Carolene Products Co., 304 U. S. 144 22
U. S. v. Cohen Groc. Co., 255 U. S. 81 23
U. S. v. Hautou, 43 F. Supp. 507 23
U. S. v. Mellon, 96 F. 2d 462, cert. denied 304 U. S. 586 19
U. S. v. Moore, 185 F. 2d 92 ..... 19, 20
U. S. v. Valenti, 207 F. 2d 242 19
U. S. v. Remington, 191 F. 2d 246 cert. denied 343 U. S. 907 22
Winters v. New York, 333 U. S. 507 23

Page

CONSTITUTION AND STATUTES

Article 1, Section 9, Clause 3 3

First Amendment 3

Fourth Amendment 19

Fifth Amendment 3

United States Code:

Title 18, Section 1001 ..... 2, 3, 6, 19

Title 28, Section 1254 1

Title 18, Section 3500 ..... 3, 4

Title 29, Section 159 (h) (Labor-Management Relations Act, 1947, 61 Stat. 136, Section 9 (h)) 2, 3, 4, 7, 12, 23

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States of America:

Walter C. Lohman, Jr., the petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on the 1st day of June, 1959, wherein petitioner's petition for rehearing on the decision of the United States Court of Appeals for the Sixth Circuit, May 5, 1959, affirming petitioner's judgment of conviction on a two count indictment in the United States District Court for the Southern District of Ohio, Western Division, was denied.

OPINIONS BELOW.

The opinion of the Court of Appeals (A.1) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered May 5, 1959. (A. —). On June 1, 1959, Appellant's petition for rehearing was denied. On June 24, 1959, an order extending time to file petition for Writ of Certiorari until and including July 31, 1959, was signed by Mr. Justice Potter Stewart. The Court has jurisdiction by virtue of 28 U. S. C., Section 1254.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial Court's refusal to permit petitioner the right on cross examination to lay a foundation to impeach the testimony of an informer witness called by the government by showing prior statements and conduct of the witness which would show falsity of his testimony, bias, prejudice or interest on the part of the witness constituted a denial of a fair trial and was so prejudicial as to warrant the granting of a new trial?

2. Whether the trial courts refusal to permit petitioner the right to ask the impeaching witness the impeaching question or direct examination, basing the ruling on the failure of petitioner to lay a foundation for the impeaching question on cross examination of the witness to be impeached when in fact the court had refused to permit the petitioner to lay such a foundation constituted a denial of a fair trial to petitioner and was so prejudicial as to warrant the granting of a new trial?

3. Whether in a prosecution under Section 1001 of Title 18, U. S. C., and Section 159 (h) of Title 29, U. S. C., the government must allege in the indictment and therefor prove at trial, (a) that the alleged false statement was in fact a material statement to a matter within the jurisdiction of an agency or department of the United States,

(b) and whether the question of materiality is a question of fact to be found by the jury?

4. Whether in a prosecution under Section 1001 of Title 18, U. S. C., limiting the production of reports made by an informer witness under Section 3500, Title 18, U. S. C., to the reports only of the matters testified to on direct examination when the evidence shows that other additional reports were submitted to the F. B. I. by the witness touching on the subject matter of the testimony of the informer and request for production of additional reports is made is an erroneous application of the production statute and requires the trial Court to strike all the testimony of the informer witness, and whether a refusal to either order production of the additional reports or to strike all of the testimony of the informer witness is so prejudicial as to deny the petitioner a fair trial?

5. Whether the trial court erred in failing to fully instruct the jury on the issue of membership and affiliation and whether the charge that was given was prejudicial as not setting up standards by which to determine membership and/or affiliation, and (b) whether the trial court erred in not sufficiently cautioning the jury as to standards and tests to apply to testimony of informer witnesses?

6. Whether Section 1001, Title 18, U. S. C., as made applicable by Section 9 (h) of the Labor Management Relations Act of 1947, as applied to petitioner herein violates Article 1, Section 9, Clause 3 of the U. S. Constitution as well as the First and Fifth Amendments thereto?

STATUTES INVOLVED

Title 18, U. S. C., Section 1001:

> "Statements or entries generally.
>
> "Whoever, in any matter within the jurisdiction of any department or agency of the United States know-

ingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749."

Title 29, U. S. C., Section 159 (h):

"No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits."

Title 18, U. S. C., Section 3500. Demands for production of witnesses.

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, dis-

covery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates *to the subject matter as to which the witness has testified*. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"'(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"'(e) The term "statement" as used in sub-sections (b) (c) and (d) of this section in relation to any witness called by the United States, means—

"'(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"'(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.'

"That analysis of such chapter is amended by adding at the end thereof the following:

"'3500. Demand for production of statements and reports of witnesses.'"

STATEMENT OF FACTS AND THE MATERIAL INVOLVED

A. Proceedings Below:

This is a criminal action brought under a two count indictment filed November 21, 1952, in the United States District Court for the Southern District of Ohio, Western Division, charging petitioner with violating Title 18, Section 1001, U. S. C., charging that petitioner made false, fictitious and fraudulent statements in an "Affidavit of Non-Communist Union Officer on December 6, 1949. The

oath required by Section 9 (h), 29 U. S. C., Section 159 (h).

The pertinent portions of the indictment follow:

COUNT I.

". . . in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully, wilfully, and knowingly in an affidavit of Non-Communist Union Officer (Form NLRB 1081) make a false, fictitious and fraudulent statement and representation, to wit, that he was not a member of the Communist Party when in truth and fact the said Walter C. Lohman, Jr., then and there well knew such statement to be false, fictitious and fraudulent as he then and there well knew he was a member of the Communist Party."

COUNT II.

Count II is identical to Count I with the exception that the charge was affiliated with rather than membership in. ". . . that he was not affiliated with the Communist Party when in truth and fact the said Walter C. Lohman, Jr., then and there well knew such statement to be false, fictitious and fraudulent as he then and there well knew he was affiliated with the Communist Party."

It is significant to note some of the things which the indictment failed to charge. There was no charge that the alleged false statement was in fact a material statement. It fails to charge petitioner with being an officer of the union. There is no charge that the affidavit of Non-Communist Union Officer was filed or caused to be filed in a matter within the jurisdiction of a department of the United States.

A motion to dismiss the indictment and for other relief was filed by petitioner December 17, 1952. The Court denied the motion to dismiss in an order entered January 29, 1953, and denied.

On June 9, 1958, the second trial of this case commenced and lasted through June 13, 1958. On this date the jury returned a verdict of guilty as charged on both counts of the indictment.

During the trial the Government called six witnesses. Mrs. Alma K. Jones, a supervisor of the affidavit compliance unit, Ninth Region, National Labor Relations Board (R-6-22); M. Notz, the Notary Public who notarized the affidavit (R-23-29) John Church Mitchell, who testified with reference to his alleged relations with the Communist Party, same terminating almost a year before the date in issue herein (R 30-52); and three paid informers, Arthur Paul Strunk (R 171-319); Roger E. Dunham (R 53-129); Mrs. Alice Dunham (R 130-170). The defense called character witnesses and one impeaching witness.

Appellant moved for judgment of acquittal and strike certain testimony. The motions were denied.

On June 16, 1958, the court imposed sentence, on Count One, five years and no fine; on Count Two, five years to run concurrently with the first.

Petitioner's motion for new trial or judgment of acquittal was filed and denied. On June 25, 1958, notice of appeal was filed.

On May 5, 1959, an order was entered by the U. S. Court of Appeals for the Sixth Circuit affirming the judgment of the lower court.

On May 22, 1959, Petitioner filed his petition for rehearing.

On June 1, 1959, an order was entered wherein the petition for rehearing was denied.

On June 24, 1959, an order was signed by Mr. Justice Potter Stewart extending time to file a petition for Writ of Certiorari until and including July 31, 1959.

B. The Record Facts:

1. The Informer Witnesses:

Three witnesses called by the prosecution, Roger E. Dunham, Alice Dunham and Paul Arthur Strunk, all admitted that they received pay from the F. B. I. (Each testified that the amount of pay received depended upon the amount of information submitted. The more information submitted the more pay received R-74-78).

The witnesses testified that they joined the Communist Party at the request of the F. B. I. The Dunhams allegedly joining in Springfield, Ohio, in 1940, later transferring to Dayton, Ohio; and Strunk allegedly joining at Dayton, Ohio, in 1944. (R 53-171).

Roger Dunham testified of attending a meeting of the Communist Party where petitioner was present on February, 1949. (R-55). This is the only meeting he testified about concerning petitioner before December 6, 1949. Strunk testified that petitioner became a member of the Communist Party February 22, 1948. He further testified to an alleged meeting July, 1948, March, 1949, and on December 3, 1949. Alice Dunham testified of no knowledge of petitioner's membership in the Communist Party until March, 1951, some fifteen months after the crucial date herein. (R-132).

All of the witnesses testified as to making and transmitting to the F. B. I. both oral and written reports. Motions were made by petitioner for production of these reports. Certain reports were produced by the government. The testimony of the witness Strunk particularly disclosed that there were additional reports made and transmitted to the F. B. I., but which were not produced for inspection by petitioner.

The reports which were ordered produced by the Court below were only the reports of the specific meetings testified to by the witnesses on direct examination.

2. Refusal to Permit Laying of Foundation to Impeach.

The witness Strunk was asked the question on cross examination with reference to the point in time when he in fact became a member of the communist party. Particularly, he was asked a question relative to his making a prior statement which in fact would have placed Strunk in the Communist Party as early as 1940—(Four years before he claims to have joined the Communist Party at the request of the F. B. I.) The question was objected to and sustained by the Court. (R 221-222-223) at Page 223:

> "MR. PREAR: Then your Honor, I would like to submit to the Court that the purpose behind these questions is to lay foundation to impeach the testimony of the witness.
>
> "THE COURT: Well, I think you are bound to impeach the witness on the testimony he has given in court, not to bring up something outside of this trial, or court for impeachment purposes."

And then further when the impeaching witness was called to the stand, (R-350):

> Q. Now, Mr. Rinehart, at this fund raising party, at the home of Mr. Hack, I will ask you if Mr. Strunk in your presence made any statement relative to how long he had been in the Communist Party?
>
> "MR. STUEVE: Objection—.
>
> "THE COURT: I will sustain the objection—"

and at R-352

"MR. PREAR: Now, your Honor, may I inquire for my information, is it the substance or the subject matter that is objectionable?

"THE COURT: It is because no foundation was laid for the question. You didn't ask Mr. Strunk whether or not he made such a statement."

In the examination of the paid informers, there are many inconsistencies and contradictions. The testimony conflicted in many instances with prior testimony.

3. Limitation of Production of Documents.

As stated before, the witnesses Strunk and both Dunhams testified to the making of both oral and written reports to the F. B. I. After motion of petitioner, the Court did order the government to produce some reports. However, the reports which were produced were only such reports as to meetings which the witness testified on direct examination. There is ample evidence in the record to the effect that additional reports were made and submitted to the F. B. I., touching on the general subject matter of the direct examination of the witnesses. Petitioner's motion to produce additional documents or in the alternative to strike the testimony was denied.

4. Government's Exhibit I.

Government exhibit I, purports to be an Affidavit of Non-Communist Union Officer bearing what is alleged to be the signature of the petitioner. *No* evidence *was* introduced identifying the signature of the petitioner.

Mrs. Jones testified to the effect that the paper came into her custody sometime in January, before January 17, 1950. She had no personal recollection nor memory of same.

5. MATERIALITY AND ESSENTIAL ELEMENTS REQUIRED TO BE PROVEN BY GOVERNMENT.

To prove the essential elements of the offenses, namely, that petitioner was an officer of a labor union; that he filed or caused to be filed the affidavit; that it was in fact a matter within the jurisdiction of a government agency, the government relied upon the affidavit alone.

To prove the essential element of materiality the record is void of testimony. The only thing upon which to base this element is found in the charge of the Court, wherein the Court stated R-421:

> "I have said that the representation that he was not a member of the Communist Party must have been a material fact. By a material fact in this case, we mean a representation without which the Local Union No. 768 could not have obtained compliance with (421) sub-section (h) of Section 159 of Title 29 of United States Code. *The Court says to you as a matter of law that the matter of representation contained in the affidavits is a material fact.*" (Emphasis Ours)

Membership in or affiliation with the Communist Party must be shown by direct proof of overt acts which, it believed, lead inevitably to the inference of membership or affiliation at the time in issue. These overt acts, as Chief Justice Vinson pointed out in *American Communications Association* v. *Douds*, 339 U. S. 382, are such as the act of joining the Communist Party..

Applying these standards, there is no direct evidence in the record as to actual membership or affiliation of petitioner with the Communist Party at the crucial period. The prosecution rested its case solely upon certain testimony, concerning activities of petitioner relating to periods other than the time in issue. In the absence of such direct

testimony, the prosecution sought to sustain its burden through the establishment of a pattern of circumstantial evidence based upon certain presumptions.

The Government's case revolved around two alleged occurrences: a discussion purporting to have taken place in January or February, 1949, and a discussion purporting to have taken place on December 3, 1949. This evidence was developed through the testimony of two witnesses who confessed on the stand to having been paid informers for the prosecution.

Four witnesses testified as to petitioner's alleged membership in or affiliation with the Communist Party. The first witness, John Mitchell testified that he severed all relations with the Communist Party in or about February, 1949, (R. 226-227) and therefore could not give evidence relevant to the period at issue in the present proceedings. The other three witnesses were the paid informers, Dunhams and Strunk.

There is no direct evidence as to alleged Communist membership or affiliation during the period of time legally relevant to the offense charged, namely, false swearing as to membership in or affiliation with the Communist Party on December 6, 1949.

The prosecution introduced considerable evidence over defense objection concerning petitioner's alleged associations with the Communist Party considerably prior to the signing of the affidavit. This evidence was legally irrelevant to the issues of the case and highly prejudicial. For the relevant period of time, on or about December 6, 1949, there is no evidence concerning any act indicative of membership in the Communist Party. There is no evidence concerning any registration with the Communist Party. There is no evidence concerning any dues payment to the Communist Party.

Finally, some evidence was introduced concerning alleged Communist activity at a time considerably after the relevant period.

Thus, as of December 6, 1949, and for a considerable period of time before that date and after, there was no direct evidence in the record of any overt acts from which the jury could have inferred that petitioner was in fact a member of or affiliated with the Communist Party on the crucial day, December 6, 1949.

While the indictment charged petitioner with being an affiliate of the Communist Party, no evidence was adduced in support of this contention. A Government witness testified that the only relationship with the Communist Party is one of membership. There was testimony concerning membership cards and membership lists. Application forms provided only for the status of membership with certain associated and clearly defined rights, privileges and duties. There is no evidence in the record that the organization permitted such a relationship of affiliation or that petitioner was aware of such a status.

At the conclusion of the prosecution's case, petitioner moved for a directed verdict of acquittal on the ground, inter alia, that the Government had failed to sustain its burden of showing beyond a reasonable doubt that petitioner was in fact a member of the Communist Party or affiliated therewith on December 6, 1949. The trial court denied this motion and petitioner adduced the testimony of character witnesses. These witnesses, all testified to petitioner's good character and reputation for truth and honesty. In addition the impeaching witness Rinehart was called.

REASONS FOR GRANTING THE WRIT

1. This petition brings to the Court for review a criminal proceeding based on enforcement of the non-communist oath required of officers of labor unions under Section 159 (h) of Title 29 U. S. C. Not only does this case contain numerous constitutional and statutory problems with respect to the Labor Management Relations Act as was foreseen by this Court in the opinions in *American Communications Association* v. *Douds*, 339 U. S. 382, but in addition thereto it presents an additional problem of interpretation and limitation of the application of the production statute arising by virtue of the decision of this Court in *Jencks* v. *U. S.*, 353 U. S. 657.

Added to this there were two further problems presented in this case which we submit that this Court should in the public interest review. The decision of the lower Court herein is in direct conflict with the opinion rendered by the Court of Appeals for the 9th Circuit in the case of *Cossack* v. *U. S.*, 63 F. 2d 511, on the question of impeachment of witness on cross examination. The decision of the lower Court herein is in conflict with the reasoning of this Court in the cases of *Gordon* v. *U. S.*, 344 U. S. 414; *Freidus* v. *U. S.*, 223 U. S. 598 and *Rolland* v. *U. S.*, 200 F. 2d 678, with respect to the question of materiality of statement.

In view of the conflict of decisions together with the departure of the lower Court from the usual and accepted course of judicial proceedings petitioner submits it calls for the exercise of this Court's power of supervision.

The trial Court refused to permit petitioner the right on cross examination to lay a foundation to impeach the testimony of an informer witness called by the prosecution. As the Court of Appeals for the Ninth Circuit stated in *Cossack* v. *U. S.*, *supra*, at page 514 "Full cross examination

of witness on subjects of direct examination is absolute right not mere privilege, and denial thereof is fatal error," and further at page 515 "Thereupon, the appellant announced that he wanted to lay a foundation for the purpose of showing the conversation.

> MR. COSSACK: In other words, your Honor, I desire to ask her whether she had a conversation with a person by the name of Steve Revall (Rehwold).
> THE COURT: Never mind.
> MR. COSSACK: If the Court please, it goes to the meat of the situation.
> THE COURT: That is enough.
> MR. COSSACK: Might I make my offer.
> THE COURT: No.
> MR. COSSACK: I take an exception."

It is perfectly clear from the record that appellant was attempting to lay a foundation for the impeachment of the witness Totten, but that he was improperly not permitted to do so.

Later appellant called Stephen P. Rehwold. Rehwold testified that he had a conversation with Mrs. Totten — in which appellant's name was mentioned —. When appellant asked Rehwold what that conversation was, the Government objected on the ground that no foundation had been laid. The Court sustained the objection, even after appellant reminded it that he had requested the right to cross examine Mrs. Totten while she was on the stand for the very purpose of laying a foundation.

A comparison of the record below shows the two cases to be identical.

> "Q. You made the statement in the presence of Gene Rinehart and his wife Bess, and Mr. Hack out in the East End, that you were even a member of the Communist Party before you left Germany and you bragged about it, didn't you?

MR. STUEVE: Objection. That is not in evidence, not connected up in this case in any way. He is quoting a statement this man is supposed to have made to somebody else at some other time and place, completely collateral to any thing in this case.

THE COURT: I will sustain the objection.

MR PREAR: May I inquire of this witness, your Honor, whether or not he made such a statement?

THE COURT: That is what I sustained the objection to.

MR. PREAR: Is it the form or substance of the question?

MR. STUEVE: Substance.

THE COURT: Substance.

MR. PREAR: Then, your Honor, I would like to submit to the Court that the purpose behind these questions is to lay foundation to impeach the testimony of this witness.

THE COURT: Well, I think you are bound to impeach the witness on the testimony he has given in Court, not to bring up something outside of this trial or Court for impeachment purposes."

And then when the witness Rinehart was called R-352:

"Q. I will ask you whether or not Arthur Strunk at a meeting in the home of James Hack, made the statement, 'I was a member of the Communist Party before I left Germany.' The answer to that question would be 'yes'."

The following proceedings were in the hearing of the jury:

"MR. PREAR: Now, your Honor. May I inquire for my information, is it the substance of the subject matter that is objectionable?

THE COURT: It is because no foundation was laid for the question. You didn't ask Mr. Strunk whether or not he made such a statement.

MR. PREAR: Your Honor, if I remember correctly, I asked Mr. Strunk these questions relative to Mr. Rinehart when I had him on cross examination."

Suffice it to say that the Government on direct examination asked the witness Strunk when he joined the Communist Party. His reply thereto was that he joined in 1944 at the request of the F. B. I. Certainly justice requires that if in fact he joined long years before, the jury should have been permitted to be so advised. In fact if he falsified as to the time of joining the party in fact, then the whole foundation of his testimony crumbles.

The Court of Appeals attempted to justify this error by classing this as a collateral matter when they said in their opinion at page 2, "Cross examination is, of course, of highest importance in an effort to elicit truth, but its limitation in the circumstances of each case rests largely within the sound discretion of the trial court. (Cases cited) This is particularly true with respect to cross examination on collateral matters."

The petition for certiorari should be granted on this point and the judgment of conviction reversed forthwith.

2. The limitation of the trial judge as sustained by the Court of Appeals in respect to the limitations imposed on the production of documents violated the requirements of Title 18, Section 3500 U. S. C. and denied to petitioner a fair trial.

The Government furnished to petitioner certain reports and documents. On cross examination of the witnesses, it was developed that there were other reports submitted to the F. B. I. covering the subject matter of the direct examination of the witnesses. (R-197-214-215)

The theory of the trial judge is shown when he stated, R-216, "I don't think that in your cross examination you can raise all sorts of questions about reports and have him — have the government produce these reports". Petitioner submits that under the production statute if he can show that reports were made and submitted and they touch

on the subject matter of the testimony of the witness on direct examination when motion to produce is made the reports should be ordered produced.

If the government could be ordered to produce reports and after producing any given number of reports, the Statute would have little meaning or offer no protection to an accused if he were not permitted to inquire as to additional reports.

This failure to follow the directives of the Statute denied to petitioner the right and benefit to a fair trial.

3. The indictment of petitioner fails to allege either in haec verba or otherwise that the alleged false statements were material statements to matter within the jurisdiction of a department of the United States. The lower court held that such an indictment under Section 1001 was sufficient. This is contrary to the opinions of other Court of Appeals. *Rolland* v. *United States*, 200 F. 2d 678 (C.A. 5), cert. denied 345 U. S. 964; *United States* v. *Valenti*, 207 F. 2d 242 (C.A. 3); *Cohen* v. *United States*, 178 F. 2d 588 (C.A. 6); *Todorow* v. *United States*, 173 F. 2d 439 (C. A. 9); *United States* v. *Barra*, 149 F. 2d 489 (C.A. 2); *Sanchez* v. *United States*, 134 F. 2d 279 (C.A. 1), cert. denied 319 U. S. 768; *Terry* v. *United States*, 131 F. 2d 40 (C.A. 8); *United States* v. *Mellon*, 96 F. 2d 462 (C.A. 2), cert. denied 304 U.S. 586.

These Courts of Appeals hold that the making of a material statement within the jurisdiction of a department of the United States is an essential ingredient of any offense under Section 1001. Moreover, where the matter has been posed other Courts of Appeals have held that since this is an essential ingredient of an offense, an indictment under Section 1001 must charge that the alleged false statement is a material statement. *Rolland* v. *United States*, *supra*; *United States* v. *Moore*, 185 F. 2d 92 (C.A. 5);

Todorow v. *United States*, *supra*; *Harris* v. *United States*, 104 F. 2d 41 (C.A. 8); *Hills* v. *United States*, 97 F. 2d 710 (C.A. 9); *Danaher* v. *United States*, 39 F. 2d 325 (C.A. 8).

The problem presented in this conflict of the circuits is a serious and important one in the administration of federal criminal justice as well as in the interpretation of Section 1001. This requirement of materiality is not a formal or technical one but was inserted in the statute to limit its application. See *United States* v. *Moore* and *Rolland* v. *United States*, *supra*. It serves to mitigate the severity and limit the scope of the statute and to substitute in part at least for some of the probative limiting elements now removed from it which were contained in the earlier versions.

By adding the requirement of materiality, Congress indicated its intent that the statute apply only to those representations which objectively would give rise to the likelihood of reliance and injury. Only those statements are deemed to be material which may seek to influence or affect governmental action.

If the indictment were properly to charge materiality, it would have to allege at least that the petitioner was an officer of a trade union and further that the statement was used and filed in a matter within the jurisdiction of the National Labor Relations Board. Absent these two considerations, the essential ingredients of the offense are lacking.

Since the indictment of petitioner concededly does not allege materiality in haec verba nor does it set forth facts which would show materiality (compare *Rolland* v. *United States*, *supra*), the indictment is fatally defective and should have been dismissed.

Since this was not done, however, at least the Court should have required materiality to be proven. This can-

not be cured by the Court's charge as given by the trial court below.

4. In *Douds*, this Court in the majority opinion of Mr. Chief Justice Vinson, carefully pointed out that Section 9 (h) of the Labor-Management Relations Act clearly impinges upon the areas of liberty protected by the First Amendment to the Constitution. The divided Court in sustaining the statute against an attack upon its face, left open, for review in a subsequent proceeding the many difficult constitutional problems involved in an application of this statute to a particular individual in a criminal proceeding. This petition now brings these problems, foreshadowed in *Douds*, squarely before the Court.

Surely, where the Government seeks to invoke the power of the criminal law to enforce a sanction admittedly impinging upon the area of First Amendment liberty, it will be held to at least the same standards as those applied to sustain the civil and administrative aspects of the statute wherein a hearing is held and determination made as to the impact, if any, of the particular case upon interstate commerce. Thus at a minimum, petitioner was entitled to adduce facts before the trial court tending to show that the situation was such as to require a ruling that the statute could not be constitutionally applied to him.

The petitioner urged that under the *Douds* decision it was incumbent upon the Government to charge in the indictment and prove at the trial that petitioner himself fell within the category delineated by the Chief Justice. Furthermore, petitioner offered to prove in support of his motion to dismiss the indictment that the facts were such as to indicate that Section 9 (h) as upheld in *American Communications Association* v. *Douds* could not constitutionally serve as a foundation for a criminal indictment against him (R. 24). It is, of course, always open

to a defendant to adduce evidence to show that a particular statute may not be constitutionally applied against him. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543; *Home Building & Loan Ass'n.* v. *Blaisdell*, 290 U. S. 398; *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 415.

Under the impact of the First Amendment, this Court further limited the applicability of the statute to those situations where the truth or falsity of the political oath required can be shown by "objective facts which may be proven directly."

Both the trial court and the Court of Appeals totally ignored this constitutional mandate. The jury was not instructed that the alleged falsity of the political foreswearing must be proven by direct proof of certain specific overt acts, such as the act of joining the Communist Party. In this case the jury was instructed directly to the contrary.

The charge of the trial judge below falls far short of the requirements established in *Douds* and *Remington*, *supra*. As far as the charge below is concerned, the jury might well have found that petitioner was a member of the Communist Party and knew he was merely by relying on any one of the many facts which the Judge told them they could "consider." Thus the jury might have rested its conclusion merely upon finding that petitioner "took part in the dissemination or distribution of Communist literature."

The record evidence upon which petitioner's judgment of conviction rests reveals that petitioner has been convicted of the exercise of rights solely within the protected orbit of the First Amendment. The acts for which the Government seeks to imprison petitioner consist solely of alleged attendance at meetings, discussions on political, social and economic matters, as well as other activities of a normal, peaceful political character. There is no evi-

dence in this record of any illegal conduct or activity or of any illegal advocacy or incitement. More than this, there is no evidence in the record to indicate that the activities of petitioner have created or threaten to create any serious danger of a substantive evil within congressional power. This Court has held that a statute which can be construed to sustain a judgment of conviction based upon such facts plainly violates the First Amendment. *Snia* v. *New York*, 334 U. S. 558, 562; *Thomas* v. *Collins*, 323 U. S. 516, 530; *Thornhill* v. *Alabama*, 310 U. S. 88, 95; *Schneider* v. *State*, 308 U. S. 147, 161; *Winters* v. *New York*, 333 U. S. 507; *Jones* v. *Opelika*, 316 U. S. 584, 618; *DeJonge* v. *Oregon*, 299 U. S. 353; *Stromberg* v. *California*, 283 U. S. 359; *Burstyn* v. *Wilson*, 343 U. S. 495.

The instructions of the trial judge as sustained by the lower court in respect to the question of affiliation with the Communist Party violated the requirements of the First and Fifth Amendments to the Constitution. The charge given was utterly meaningless and left the jury without any standards whatsoever upon which to base a finding of guilt or innocence. As this Court pointed out in *Douds*, the term "affiliated" is at best of "dubious scope." *C. I. O.* v. *Douds*, *supra*, p. 420. See also *Bridges* v. *Wixon*, 326 U. S. 135. Thus, the word "affiliated" as used in the statute and as construed and applied to the petitioner herein is so vague, uncertain and indefinite as to set no intelligible standard of proscribed conduct for the jury. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *United States* v. *Cardiff*, 344 U. S. 174; *United States* v. *Hautau*, 43 F. Supp. 507 (D.C. N.J.); *Bridges* v. *Wixon*, *supra*, at 143-147.

The foregoing points out the many and difficult problems which are presented in a prosecution based upon political associations. Presented in this petition are the constitutional and statutory problems which necessarily

must flow from a statute which seeks to establish a political test oath. When considered within the context of a criminal proceeding, the fundamental infirmity of such statutes we submit becomes much clearer.

CONCLUSION

This petition for a writ of certiorari ought to be granted and the judgment of conviction reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 13,667

WALTER C. LOHMAN, JR.,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

(Decided May 5, 1959.)

BEFORE: ALLEN, MCALLISTER AND MILLER, *Circuit Judges*.

MILLER, *Circuit Judge*. In a previous trial of this case the appellant was found guilty by a jury under a two-count indictment charging him with violating the provisions of Sec. 1001, Title 18, U. S. Code, by falsely swearing on December 6, 1949, in an affidavit filed with the National Labor Relations Board that he was not a member of or affiliated with the Communist Party. The affidavit was filed in accordance with the provisions of Sec. 9 (h) of the National Labor Relations Act, Sec. 159 (h), Title 29, U. S. Code. On appeal the judgment was reversed for failure of the trial court to comply with the rule subse-

quently laid down by the Supreme Court in Jencks v. United States, 353 U. S. 657. Lohman v. United States, 251 F. (2) 951, C. A. 6th.

On the second trial of the case appellant was again convicted by a jury and received a sentence of five years on each count, to run concurrently. The case has been brought here for the second review.

Some of appellant's contentions on this review are disposed of by our rulings on the prior review. At that time we found the evidence sufficient to support the jury's verdict. We carefully considered the Court's instructions to the jury and stated how they should be amplified when the case was again tried. We held that no debatable constitutional question was evident. We found no merit in the other contentions of the appellant with the exception of the Court's failure to meet the requirements subsequently stated by the Supreme Court in Jencks v. United States, supra, with respect to the production of reports or statements made by government witnesses. Lohman v. United States, supra, 251 F. (2) 951, C. A. 6th. See also: Hupman v. United States, 219 F. (2) 243, C. A. 6th. cert. denied, 349 U. S. 953. Our opinion on the first review of this case states the law of the case on the questions therein involved. Pet Milk Co. v. Boland, 185 F. (2) 298, 300-301, C. A. 8th. Other contentions, not foreclosed by the first trial, have been made on this review and have had our consideration.

Appellant complains of improper limitation of his right of cross-examination of government witnesses. As we said in Cariepy v. United States, 220 F. (2) 252, 263, C. A. 6th, "Cross-examination, is, of course, of highest importance in an effort to elicit truth, but its limitation in the circumstances of each case rests largely within the sound discretion of the trial court. (Cases cited.)". This is particularly true with respect to cross-examination on

collateral matters. United States v. Lawinski, 195 F. (2) 1, 7-8, C. A. 7th; Dolan v. United States, 218 F. (2) 454, 459, C. A. 8th, cert. denied, 349 U. S. 923. We find no prejudicial error in this phase of the case.

The District Judge instructed the jury on the question of the credibility of three government witnesses who were paid informers. Appellant contends it was not as strong as it should have been. We are of the opinion that it was adequate. Wellman v. United States, 227 F. (2) 757, 769-770, C. A. 6th.

We find no merit in appellant's contention that the Government knowingly used false or perjured testimony.

What appears to be the main issue on this second review is appellant's contention that, in view of the ruling in Jencks v. United States, supra, Sec. 3500, Title 18, U. S. Code, is unconstitutional, and that, even if constitutional, it was incorrectly applied by the District Judge in the second trial. Sec. 3500, dealing with the production of statements previously made by a government witness, for the purpose of examination by a defendant, was enacted September 2, 1957, following the ruling of the Supreme Court in the Jencks case.

The contention that Sec. 3500 is unconstitutional has been considered and rejected in Scales v. United States, 260 F. (2) 21, 44, C. A. 4th, cert. granted, 358 U. S. 917; United States v. Spangelet, 248 F. (2) 338, 340-341, C. A. 2nd; United States v. De Lucia, 262 F. (2) 610, 614, C. A. 7th; and Sells v. United States, 262 F. (2) 815, 822-824, A. A. 10th. We are in accord with the views expressed in those opinions, subject, of course, to the pending review of the ruling by the Supreme Court of the United States. Under the circumstances, it is unnecessary to further discuss this issue.

Sec. 3500 (b) provides that after a witness called by the United States has testified on direct examination, the

Court shall, on motion of the defendant, order the United States to produce "any statement * * * of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." In the testimony of government witnesses in this case it appeared that in addition to the reports which the witness made to the F. B. I. with respect to the matters he testified about there were other documents, papers, or records transmitted by the witness to the F. B. I. The District Judge overruled appellant's motion that such additional documents or papers be produced for his inspection. *The ruling was based on his construction of the statute that it was limited to matters testified to by the witness on direct examination*, and did not give the appellant the right to require the production of reports and documents transmitted by the witness, but about which the witness did not testify. We are of the opinion that the ruling was consistent with the views expressed in Jencks v. United States, supra, and was the correct construction of the statute. The statute was not enacted for the purpose of authorizing a fishing expedition into government files, and should be restricted to those matters which relate to the direct testimony of the witness for the purposes of cross-examination.

We find no prejudicial error resulting from the initial refusal of the District Judge to order the production of certain documents in the possession of the Government, to which the appellant claims he was entitled under Sec. 3500. A subsequent ruling after appellant made a proper foundation for his motion made such documents available to appellant. Assuming, but not so ruling, that an error was made, it was cured. We fail to see how the short delay in receiving the documents in any way prejudiced the appellant in presenting his case to the jury. Rule 52 (a) Rules of Criminal Procedure. United States v. Miller,

248, F. (2) 163, 165, C. A. 2nd. Kotteakos v. United States, 328 U. S. 750, 764.

The judgment is affirmed.

JUDGMENT

(Filed May 5, 1959.)

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

ORDER DENYING REHEARING

(Filed June 1, 1959.)

Appellant's petition for rehearing having been considered by the Court;

IT IS ORDERED that said petition be denied.

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JAMES R. BROWNING, Clerk

No. 268

In the Supreme Court of the United States

OCTOBER TERM, 1959

WALTER C. LOHMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	14

CITATIONS

Cases:

Alford v. *United States*, 282 U.S. 687	10
American Communications Assn. v. *Douds*, 339 U.S. 382	12, 13
Blitz v. *United States*, 153 U.S. 308	10
Bridges v. *Wixon*, 326 U.S. 135	14
Bryson v. *United States*, 238 F. 2d 657, certiorari denied, 355 U.S. 817	8
Cossack v. *United States*, 63 F. 2d 511	9, 10, 11
Dillard v. *United States*, 141 Fed. 303	10
Dolan v. *United States*, 218 F. 2d 454, certiorari denied, 349 U.S. 923	10
Fisher v. *United States*, 231 F. 2d 99	8, 14
Galvan v. *Press*, 347 U.S. 522	14
Glasser v. *United States*, 315 U.S. 60	9
Hagner v. *United States*, 285 U.S. 427	6
Hirabayashi v. *United States*, 320 U.S. 81	8
Hupman v. *United States*, 219 F. 2d 243, certiorari denied, 349 U.S. 953	5, 6, 8
Jencks v. *United States*, 226 F. 2d 540, reversed, 353 U.S. 657	3, 8, 12, 14
Lawn v. *United States*, 355 U.S. 339	8
Lindsey v. *United States*, 133 F. 2d 368	10

Cases—Continued

	Page
Osman v. *Douds*, 339 U.S. 846	12
Palermo v. *United States*, 360 U.S. 343	11
Rosenberg v. *United States*, 360 U.S. 367	11, 12
Roviaro v. *United States*, 353 U.S. 53	8
Sells v. *United States*, 262 F. 2d 815, certiorari denied, 360 U.S. 913	7, 8
Sinclair v. *United States*, 279 U.S. 263	7
Travis v. *United States*, 247 F. 2d 130	14
Travis v. *United States*, 269 F. 2d 928, pending on petition for a writ of certiorari, No. 479, this Term	8, 14
United States v. *Behrman*, 258 U.S. 280	6
United States v. *Delrow*, 346 U.S. 374	6
United States v. *Killian*, 246 F. 2d 77, reversed on rehearing, 246 F. 2d 82	8
United States v. *Lawinski*, 195 F. 2d 1	10
United States v. *Manton*, 107 F. 2d 834, certiorari denied, 309 U.S. 664	10
United States v. *Silver*, 235 F. 2d 375	6
Constitution:	
First Amendment	2, 13
Statutes:	
Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 73 Stat 519:	
Sec. 201(d)	2
Sec. 504(a)	2
National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, *et seq.*:	
Sec. 9(f)	13
Sec. 9(g)	13
Sec. 9(h)	2, 3, 5, 7, 12, 13
18 U.S.C. 1001	2, 6
18 U.S.C. 3500	2, 11, 12
Rule:	
Rule 7(c), F.R. Crim. P.	6

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 268

WALTER C. LOHMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a–5a) is reported at 266 F. 2d 3. The opinion of the Court of Appeals reversing the petitioner's conviction following his first trial is reported at 251 F. 2d 951.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1959 (Pet. App. 5a), and a petition for rehearing was denied on June 1, 1959 (*ibid.*). On June 24, 1959, Mr. Justice Stewart entered an order extending the time for filing a petition for a writ of certiorari to and including July 31, 1959. A typewritten copy of the petition was filed on that date

and, thereafter, the Government was served with a printed copy of the petition on November 4, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment was fatally defective because it did not charge, in *haec verba,* that the petitioner's false statements were material.

2. Whether the evidence is sufficient to support the verdict.

3. Whether the petitioner was deprived of a fair trial because of (*a*) limitations imposed by the trial court on the cross-examination of a Government witness, or (*b*) the trial court's rulings on the application and construction of 18 U.S.C. 3500.

4. Whether the petitioner's conviction for violation of 18 U.S.C. 1001 for filing a false non-Communist affidavit violated the provisions of the First Amendment.

5. Whether the trial court's instructions on the meaning of the terms "membership" and "affiliation" were proper.

STATUTES INVOLVED

The text of 18 U.S.C. 1001; Section 9(h) of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947, c. 120, § 101, 61 Stat. 136, 146 (29 U.S.C. 159(h));[1] and 18 U.S.C. 3500 are set forth in the petition at pp. 3–6.

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[1] Section 9(h) was repealed on September 14, 1959 by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 73 Stat. 519. Section 504(a) of the new Act, however, provides that no person who is or

STATEMENT

The petitioner was charged, in a two-count indictment returned on November 21, 1952, in the United States District Court for the Southern District of Ohio, Western Division, with violation of 18 U.S.C. 1001 (Pet. 3–4), by falsely swearing on or about December 6, 1949, in an affidavit filed with the National Labor Relations Board pursuant to the provisions of Section 9(h) of the National Labor Relations Act, as amended (29 U.S.C. 159(h)) (Pet. 4), that he was not a member of (Count I), or affiliated with (Count II), the Communist Party.

Following a trial by jury, the petitioner was found guilty on both counts in September, 1955, but on appeal to the Court of Appeals his conviction was reversed and a new trial ordered because the trial court had failed to order production of pre-trial statements of Government witnesses in accordance with the rule laid down by this Court in *Jencks* v. *United States*, 353 U.S. 657 (*Lohman* v. *United States*, 251 F. 2d 951 (C.A. 6)). Upon retrial, the petitioner was again convicted on both counts (R. 433) and was sentenced to five years imprisonment on each count, the terms to run concurrently. On appeal to the Court of Appeals for the Sixth Circuit, the judgment of conviction was affirmed (Pet. App. 1a–5a).

The evidence presented by the Government may be summarized as follows:

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has been a member of the Communist Party may hold office in a labor organization or association of employers dealing with a labor organization during, or for five years after the termination of, his membership in the Communist Party.

The petitioner was an active member of the Communist Party and a regular attendant at its meetings from early in 1948 to the latter part of 1951. The petitioner was enrolled in the Party on February 22, 1948, by Government witness Arthur Strunk (R. 173–174) who was then financial secretary of the Dayton, Ohio, branch of the Party (R. 172). At the time of enrollment Strunk collected an initiation fee and dues for the month of March, 1948, from the petitioner and issued to him a registration card bearing the number 62,575 (R. 173–174, G. Ex. 6, R. 320). Shortly thereafter Strunk received a donation from the petitioner for the sustaining fund and national fund of the Party (R. 178–179). The petitioner, following his enrollment, was assigned to the "Amalgamated Club", a group of Party members who were either officials of Amalgamated Local 768, United Electrical, Radio and Machine Workers of America, or worked for employers whose employees were represented by that union (R. 32–34), and during the year 1948 attended many meetings of the Party in Dayton (R. 35–37, 180–183).

In 1949 the petitioner renewed his registration in the Party (R. 183) and continued to attend its meetings (R. 55–59, 183–185). At a meeting held at Bryant Park near Yellow Springs, Ohio, that same year he discussed with other members the Party's paper—"The Worker"—and promised to solicit subscriptions for the paper (R. 58–59). On December 3, 1949, the petitioner attended a Party meeting at the home of

Melvin Hupman[2] in Dayton (R. 183-185). Lon Chancey, who, at that time, was Secretary of the Ohio Communist Party, was also present at this meeting and he told the members that reregistration would be handled "a little bit different" for the year 1950 (R. 184). He pointed out that because of the Party's "new national policy" of compliance with Section 9(h) added by the Taft-Hartley Act, five Party members in Dayton would have to sign non-Communist affidavits. These five members, Chancey said, would henceforth report as a separate group which was to be known as the Taft-Hartley or T-H group (R. 184–185). The petitioner was designated as a member of this group (R. 185).

A few days later, on December 6, 1949, the petitioner, as an officer of Amalgamated Local 768, United Electrical, Radio and Machine Workers of America (R. 10), signed and procured notarization of a non-Communist affidavit at the office of the union in Dayton (G. Ex. 1, R. 24–25, 29). Upon the filing by Local 768 of the necessary documents, including the petitioner's affidavit, at the ninth regional office of the National Labor Relations Board in Cincinnati, Ohio (G. Exs. 1, 2, R. 7–11, 13), the latter notified Local 768 by letter that it was placed in compliance with Section 9(h) of the National Labor Relations Act, as amended, until February 1, 1950 (G. Ex. 3, R. 11-12).

Following the execution and filing of the affidavit,

[2] In 1954, Hupman was also convicted of filing a false non-Communist affidavit with the National Labor Relations Board. *Hupman* v. *United States*, 219 F. 2d 243 (C.A. 6), certiorari denied, 349 U.S. 953.

the petitioner remained an active member of the Communist Party and attended meetings of the Party in Dayton, in 1950 and in 1951 (R. 131–133, 185–193, 194–196). Even as late as October, 1951, witness Strunk testified that he received from the petitioner a ten dollar contribution to the sustaining fund of the Party which was used for the support of the Party's full-time organizer of the Dayton section (R. 193–194).

ARGUMENT

We submit that the Court of Appeals correctly affirmed the petitioner's conviction and that this case presents no issue calling for review by this Court.

1. There is no substance to the petitioner's contention (Pet. 19–21) that the indictment was fatally defective because it failed to allege the materiality of the false statements. Assuming that the provisions of 18 U.S.C. 1001, prohibiting false statements and documents require that the misrepresented facts be material (but cf. *United States* v. *Silver*, 235 F. 2d 375, 377–378 (C.A. 2)), the indictment here was sufficient since it was substantially in the language of the statute and since it alleged the essential elements of the crime with enough particularity to apprais the petitioner of the nature of the charge. *United States* v. *Debrow*, 346 U.S. 374; *Hagner* v. *United States*, 285 U.S. 427, 431; *United States* v. *Behrman*, 258 U.S. 280, 288; Rule 7(c), F.R. Crim. P. The court below has previously held that an identical indictment sufficiently charged that the false statements were material, *Hupman* v. *United States*, 219 F. 2d 243, 248, n. 5, certiorari denied, 349 U.S. 953.

The Government proved that the petitioner executed and signed the affidavit (R. 23–29; G. Ex. 1) and that his union Local 768, United Electrical Radio and Machine Workers of America, was placed in compliance with Section 9(h) of the National Labor Relations Act, as amended, as a result, *inter alia*, of the filing of his affidavit with the ninth regional office of the National Labor Relations Board (R. 6–14; G. Exs. 1–3). This evidence proved the materiality of the petitioner's false statements. *Sells* v. *United States*, 262 F. 2d 815, 818–819 (C.A. 10), certiorari denied, 360 U.S. 913. Thus, assuming *arguendo* that the false statements were required to be material, there was no failure of proof in the present case.[3]

2. There is likewise no substance to the petitioner's contention (Pet. 12–14) that the evidence was insufficient to prove his membership in the Party on the dates the affidavit was executed and filed. The Government proved through the testimony of four witnesses (R. 30–36, 53–60, 130–132, 171–196) that petitioner was an active member of the Communist Party and regular attendant at its meetings continuously from February 1948 through October 1951. One of the meetings referred to took place within three days of the date of the affidavit (see R. 183–185). It was not necessary to introduce direct evidence of his membership on the precise date; it was sufficient if his membership on that date was inferable

[3] There was clearly no error, moreover, in the trial court's charge to the jury (see Pet. 12) that the materiality of the false statements was established as a matter of law. Cf. *Sinclair* v. *United States*, 279 U.S. 263, 298.

from the evidence of his membership before and after that date.[4] See *Hupman* v. *United States*, *supra*, at 248; *Jencks* v. *United States*, 226 F. 2d 540, 547–548 (C.A. 5), reversed on other grounds, 353 U.S. 657; *Fisher* v. *United States*, 231 F. 2d 99, 103 (C.A. 9); *Bryson* v. *United States*, 238 F. 2d 657, 663 (C.A. 9), certiorari denied, 355 U.S. 817; *United States* v. *Killian*, 246 F. 2d 77, 80–82 (C.A. 7), reversed on rehearing on other grounds, 246 F. 2d 82; *Sells* v. *United States*, *supra*, at 820; *Travis* v. *United States*, 269 F. 2d 928, 936–937 (C.A. 10), pending on petition for a writ of certiorari, No. 479, this Term.

3. A Government witness, Arthur Strunk, testified on direct examination that he joined the Communist Party in 1944 at the request of the F.B.I. (R. 171). On cross-examination he was asked whether he was not in fact a Party member before 1944 and he answered—"Definitely not" (R. 222). He was then asked whether he had not made a statement to one Rinehart, at a party, to the effect that he was a member of the Communist Party before 1944 (R. 222–223). The trial court sustained an objection to this latter question, pointing out that impeachment should be restricted to matters which the witness testified to on direct examination (R. 223). Later, petitioner's

[4] Since the sentence imposed on the affiliation count of the indictment was made to run concurrently with the sentence imposed on the membership count (Pet. 8), there is no necessity to consider the petitioner's contention (Pet. 14) that the evidence was insufficient to prove he was affiliated with the Communist Party on the date the affidavit was filed. *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*, 353 U.S. 53, 59, n. 6; *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105.

counsel called Rinehart as a witness and he testified that he knew Strunk as a member of the Communist Party during the period he (Rinehart) was a member of the Party from 1939 to 1942 (R. 346-347). The petitioner's counsel then asked Rinehart whether Strunk had not made a statement to him in 1941 at a party to the effect that he (Strunk) was and had been for some time a member of the Communist Party (R. 349–352). An objection to the question was sustained by the trial court (R. 352). Counsel then made a proffer to the effect that the answer to the question would have been "Yes" and asked the court why the question was objectionable (R. 352). The trial judge answered that no foundation had been laid for the question by asking the witness whether he had made such a statement to which counsel remarked that according to his recollection he had asked Strunk the same question on cross-examination (R. 352–353). Thereafter, the matter was dropped. The petitioner, relying on the decision of the Court of Appeals for the Ninth Circuit in *Cossack* v. *United States*, 63 F. 2d 511 (C.A. 9), contends that the refusal of the trial court to permit him on cross-examination of Strunk to lay a foundation for the impeaching testimony Rinehart was prepared to give was prejudicial error and requires a reversal of his conviction (Pet. 10–11, 15–18).

It is well settled, however, as the court below noted (Pet. App. 2a–3a), that the extent to which cross-examination may be permitted in the circumstances of each case lies within the sound discretion of the trial court. *Glasser* v. *United States*, 315 U.S. 60,

83; *Alford* v. *United States*, 282 U.S. 687, 694. This is especially so when such cross-examination relates to collateral matters. *Blitz* v. *United States*, 153 U.S. 308, 312; *Dolan* v. *United States*, 218 F. 2d 454, 459 (C.A. 8), certiorari denied, 349 U.S. 923. Generally, the trial court's action in this respect will not be interfered with unless there has been a plain abuse of discretion. *United States* v. *Manton*, 107 F. 2d 834, 845 (C.A. 2), certiorari denied, 309 U.S. 664; *Lindsey* v. *United States*, 133 F. 2d 368, 369 (C.A.D.C.). We submit that there was no such abuse of discretion by the trial court below.

Whether Strunk became a member of the Communist Party in 1944 or before that date was clearly a collateral matter. It had no tendency to impeach his testimony that he knew the petitioner as a member of the Communist Party from 1948 through 1951 (*supra*, pp. 4–6). On this score alone, therefore, the trial court was justified in refusing to permit the petitioner's counsel to interrogate him with respect to alleged prior statements he made purportedly admitting that he had been a Party member before 1944. In this connection it has been held that a witness cannot be impeached by showing contradictory statements made by him which are not relevant to any issue in the case. *Dillard* v. *United States*, 141 Fed. 303, 310 (C.A. 9); *United States* v. *Lawinski*, 195 F. 2d 1, 8 (C.A. 7).[5]

[5] The circumstances here, moreover, are clearly distinguishable from those in the *Cossack* case, *supra*, relied on by the petitioner. In *Cossack* the defense had made *repeated* unsuccessful offers to lay the foundation for the impeachment both *during* and *after* the prosecution witness' cross-examination and

In any event, even if the trial court erred in refusing to permit the particular question complained of to be asked, it is clear that the error was harmless. Defense counsel *was* permitted to ask Strunk on cross-examination whether he was a member of the Party before 1944 and Strunk answered that he was not (R. 222). Thereafter, Rinehart was permitted to testify that he knew Strunk as a Party member from 1939 to 1942 (R. 346–347). Thus, the very facts which petitioner was attempting to elicit by the excluded questions were already in evidence for consideration by the jury.

4. Contrary to the petitioner's contention (Pet. 18–19), he was not deprived of a fair trial by the trial court's rulings with respect to production of pre-trial statements of Government witnesses pursuant to the provisions of 18 U.S.C. 3500. The trial court correctly interpreted and applied Section 3500 in a manner consistent with this Court's later construction and application of the statute in *Palermo* v. *United States*, 360 U.S. 343, and *Rosenberg* v. *United States*, 360 U.S. 367, and, pursuant thereto, ordered production of all documents to which the petitioner was properly en-

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the prosecution witness, who at the time of her testimony was on probation after pleading guilty to a felony charge, had been permitted to testify after the Government had closed its case. In addition, her testimony was highly prejudicial to the defendant and the impeaching evidence which was newly discovered, would have tended to establish that she was biased and that her testimony was fabricated. The court held that "[i]n view of all these circumstances" the trial court had abused its discretion in refusing to allow the defense to present this "newly-discovered" evidence to the jury. *Cossack* v. *United States*, *supra*, 63 F. 2d at 516.

titled under the statute. See R. 64, 69–71, 140–141, 198, 200–201. The trial court neither deprived the petitioner of an opportunity to cross-examine the Government's witnesses as to any additional reports which they might have made to the F.B.I. concerning matters they had testified to on direct examination (R. 61–122, 135–162, 196–319), and which allegedly had not been produced by the prosecution pursuant to the court's original orders to produce (see Pet. 18–19), nor refused to order the production of any such reports (See Pet. 18). Contrary to the petitioner's suggestion (Pet. 18), the cross-examination did not develop evidence that other reports concerning the subject matter of the witnesses' direct testimony had been furnished to the F.B.I., but merely that other reports concerning matters *outside the scope of the direct examination* had been submitted by the witnesses to the latter. See *e.g.*, R. 210–214, 289–290. The trial court's denial of the petitioner's motions for the production of these additional reports was based on the ground that they did not relate to the subject matter of the witnesses' direct testimony (R. 214–217, 289). The denial of these motions on this basis was clearly proper under the statute and decisions of this Court. 18 U.S.C. 3500(b); *Rosenberg* v. *United States*, *supra*, 360 U.S. at 370; cf. *Jencks* v. *United States*, 353 U.S. 657.

5. In *American Communications Assn.* v. *Douds*, 339 U.S. 382, this Court upheld the constitutionality of Section 9(h) of the National Labor Relations Act, as amended (29 U.S.C. 159(h)). See also *Osman* v. *Douds*, 339 U.S. 846. The petitioner, in effect, asks

the Court to reexamine its decisions sustaining the validity of the statute (Pet. 21–24).

There is plainly no substance to the petitioner's suggestion that the statute could not be constitutionally applied to him or that he was erroneously deprived of showing the lack of "impact" of the case on interstate commerce (Pet. 21–22). Section 9(h), before its repeal (see *supra*, p. 2, n. 1), validly applied to all responsible union officers whose unions desired to utilize the services of the National Labor Relations Board. The Board, moreover, plainly had jurisdiction over matters involving the petitioner's union and the industry and employers whose employees that union represented after the union complied with Section 9 (f), (g) and (h) by filing with it the necessary documents, including the petitioner's affidavit.

There is likewise no substance to the petitioner's contention (Pet. 22–23) that he was convicted for the exercise of rights protected by the First Amendment. Contrary to his suggestion (Pet. 22) he was not convicted because he attended meetings, engaged in political and economic discussions, or participated in other lawful activities, but because he falsely denied membership in and affiliation with the Communist Party on December 6, 1949. The Government's use of such evidence to prove his membership and affiliation with the Party on the crucial date was in no sense a violation of the petitioner's First Amendment rights. As this Court pointed out in *American Communications Assn.* v. *Douds*, *supra*, 339 U.S. at 412: "[t]hose who * * * would subvert the public interest

cannot escape all regulation because, at the same time, they carry on legitimate political activities."

6. Finally, the correctness of the trial court's instructions on the meaning of the terms "membership" and "affiliation" is well settled in light of the previous pronouncements of this Court and other federal appellate courts, and the petitioner's contentions (Pet. 22, 23) to the contrary are plainly without merit. Cf. R. 417–423 with *Joncks* v. *United States*, 353 U.S. 657, 679–680 (concurring opinion); *Galvan* v. *Press*, 347 U.S. 522, 528–529; *Bridges* v. *Wixon*, 326 U.S. 135, 142–144; *Travis* v. *United States*, 269 F. 2d 928, 941–944 (C.A. 10); *Travis* v. *United States*, 247 F. 2d 130, 135–136 (C.A. 10); *Fisher* v. *United States*, 231 F. 2d 99, 106–108, 107, n. 2 (C.A. 9).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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